

The governance of the Ecuadorian Social Security Institute: Towards a restructuring of its highest governing body?

La gobernanza del Instituto Ecuatoriano de Seguridad Social: ¿Hacia una reestructuración de su máximo órgano de gobierno?

Patricia Elizabeth Borja Laverde

Independent Legal Researcher

City: Quito

Country: Ecuador

Original article (research)

RFJ, No. 9, 2021, pp. 241-289, ISSN: 2588-0837

ABSTRACT: The composition of the IESS Board of Directors is tripartite. In 2016, the Constitutional Court declared the deferred unconstitutionality of the second and third paragraphs of article 28 of the Social Security Law, until the National Assembly approves legal reform to ensure the constitutional rights of equality and participation for the integration of this body. As of 2018, by decision of the General Controller of the State, the IESS Board of Directors had only two members. In 2020, by decision of the Court, the Board of Directors has once again a tripartite structure. Therefore, this paper aims to analyze the current structure of the Board of Directors and other factors around the governance of the highest governing body of the Ecuadorian Social Security Institute.

KEY WORDS: Ecuador, social security, government, law reform.

RESUMEN: La conformación del Consejo Directivo del IESS es tripartita. Sin embargo, en 2016, la Corte Constitucional declaró la inconstitucionalidad diferida de los incisos segundo y tercero del artículo 28 de la Ley de Seguridad Social, hasta que

la Asamblea Nacional apruebe la reforma legal que garantice los derechos constitucionales de igualdad y participación para la integración de este órgano. A partir del 2018, por decisión de la Contraloría General del Estado, el Consejo Directivo del IESS únicamente contó con dos miembros. En 2020, por decisión del órgano jurisdiccional, el Consejo Directivo ha vuelto a tener una estructura tripartita. Por tanto, el presente documento tiene la finalidad de analizar la estructura actual del Consejo Directivo y otros factores en torno a la gobernanza del máximo órgano de gobierno del Instituto Ecuatoriano de Seguridad Social.

PALABRAS CLAVE: Ecuador, Seguridad social, gobierno, reforma jurídica.

INTRODUCTION

Social security is an economic, social and cultural human right guaranteed by the Universal Declaration of Human Rights, as well as by the International Covenant on Economic, Social and Cultural Rights. In Ecuador, the Constitution of the Republic guarantees social security as a right of good living and, for its protection, it has organized a public and universal social security system, which cannot be privatized. This system is based on the principles of the national system of inclusion and social equity¹ and for the mandatory, sufficiency, integration, solidarity, participation² and subsidiarity (CRE, 2008). Likewise,

- 1 Article 340 of the Constitution of the Republic (2008) defines the national system of inclusion and social equity as the articulated and coordinated set of systems, institutions, policies, regulations, programs and services that ensure the exercise, guarantee and enforceability of the rights recognized in the Constitution and the fulfillment of the objectives of the development regime. The system will be articulated with the National Development Plan and the decentralized national participatory planning system; It will be guided by the principles of universality, equality, equity, progressiveness, interculturality, solidarity and non-discrimination; and it will work under the criteria of quality, efficiency, effectiveness, transparency, responsibility and participation. The system is made up of the areas of education, health, social security, risk management, physical culture and sports, habitat and housing, culture, communication and information, enjoyment of free time,
- 2 Despite the fact that article 34 of the Constitution (2008) provides that social security will be governed by the principles of solidarity, obligation, universality, equity, efficiency, subsidiarity, sufficiency, transparency and

it will be managed based on the criteria of sustainability, efficiency, speed and transparency (CRE, 2008).

This system's mission is to protect the population from contingencies through compulsory universal insurance and its special regimes. The compulsory universal insurance has the purpose of "covering the contingencies of sickness, motherhood, paternity, work risks, unemployment, old age, disability, death and those defined by law" (CRE, 2008), through a public entity called the Ecuadorian Social Security Institute.

Similarly, the Constitution (2008) provides that "health benefits for contingencies of illness and maternity will be provided through the comprehensive public health network", and that mandatory universal insurance should be extended to the entire urban and rural population independence of your employment situation.

Article 370 of the Constitution of the Republic of Ecuador (2008) provides that the Ecuadorian Institute of Social Security (hereinafter IESS) is an autonomous entity responsible for providing contingencies of compulsory universal insurance to its members. In its development, article 16 of the Social Security Law (2001) provides that the IESS is an autonomous, decentralized public entity, with legal status, with its own assets whose non-delegable purpose is the provision of Mandatory General Insurance throughout the national territory, as provided by the constitutional mandate. The autonomy of this institution is limited to five areas: regulatory, technical, administrative, financial, and budgetary.

participation, for the attention of individual and collective needs; Article 367 of the Constitution, when referring to the principles that guide the social security system, does not expressly include among them the principle of participation.

This could represent, at first, a kind of ignorance or violation of this optimization mandate. However, this is corrected by highlighting that the system is guided by the principles of the national system of inclusion and social equity, which constitutes an articulated and coordinated set that ensures the exercise, guarantee and enforceability of the rights recognized by the Constitution, including , the participation.

This public entity has an administrative structure headed by a highest governing body with governing (political and government) and administrative functions, called the Board of Directors, whose tripartite composition has been affected in recent years as a result of various factors.

Thus, on the one hand, there is a ruling of the Constitutional Court that, in 2016, declared the unconstitutionality with deferred effect of the second and third paragraphs of article 28 of the Social Security Law, strictly in relation to the designation of the representatives of the insured and the employers, with their alternates respectively.

However, up to now, the problem of the conformation of the IESS Board of Directors is related to some of the following factors: a) the National Assembly has not reformed these provisions; b) the deferred effect of the declaration of unconstitutionality of the aforementioned paragraphs for the appointment of the representatives of the insured and the employers has not been taken into account; and, c) the removal of the member representing the insured in 2018, by order of the General Comptroller of the State; and, their subsequent return in 2020, by decision of the competent court.

Consequently, this research constitutes an analysis of the general aspects of the regulations regarding the organization of the IESS Board of Directors and its attributions, as well as the effects of judgment No. 019-16-SIN-CC, which declared the unconstitutionality of the second and third paragraphs of article 28 of the Social Security Law, in the face of a lack of reform on the part of the National Assembly and the existence of a Board of Directors with two members, after the removal of the representative of the insured.

In this vein, this analysis aims to answer the following questions. Is it legally viable for the IESS Board of Directors to function with only two members despite having a tripartite structure, in accordance with the Social Security Law? What are

the implications and effects of the Constitutional Court ruling on the tripartite structure of the IESS Board of Directors? Is it pertinent to maintain a tripartite structure for the IESS Board of Directors?

Finally, this research seeks to propose some recommendations for a future integration of the Board of Directors of the Ecuadorian Institute of Social Security, taking into consideration the obligation of the National Assembly to comply with the disposition of the Constitutional Court and issue the respective reform to the second and second paragraphs. third of article 28 of the Social Security Law subject to unconstitutionality with deferred effect.

1. GOVERNANCE OF THE IESS AND ORGANIZATION OF ITS BOARD OF DIRECTORS: APPLICABLE REGULATIONS.

The International Social Security Association (ISSA), governance is understood as the way in which the competent authority “administers its powers to achieve the institution’s objectives, including its capacities to design, apply and innovate policies. , norms, systems and processes of the organization, with the participation and commitment of the interested parties ”(Musalem et. al, 2011, p. 13) (Cited by Calasí et. al., 2020, p. 3).

Therefore, this international organization points out that “good governance implies that the exercise of the conferred authority is responsible, transparent, predictable, participatory and dynamic.” (ISSA, 2020).

The governance of social security institutions, and in the case of Ecuador, is configured in its Constitution, which consolidates the system “agreed upon as a society and implemented in the social security program administered by the IESS” (Calasí et. al., 2020, p. 8), since the bases of the program are established there, as well as the powers, faculties, attributions and responsibilities granted to the authority responsible for applying that mandate. Hence, for Cichon et

al. (2006), “national legislation constitutes a key element of governance” (p. 138).

The governance of social security entities is based on several principles such as transparency (Calasí et. Al., 2020, p. 8) which, in the Ecuadorian Constitution, has been included as a criterion for managing the social security system.

Transparency refers to “the unrestricted and timely availability of essential and accurate information that allows interested parties to stay well informed about how to manage the institution” (Calasí et. Al., 2020, p. 8).

In Ecuador, the current Constitution was issued in 2008, while the Social Security Law came into force in 2001, hence the International Labor Organization. On the basis of several decisions of the Constitutional Court, it concludes by noting that “there are some elements in the Law that may contravene the Constitution; even two have already been observed through the rulings of the Constitutional Court No. 019-16-SIN-CC³ and No. 380-17-SEP-CC⁴”(Calasí et. Al., 2020, p. 4).

In this way, the International Labor Organization points out that this lack of articulation and deficiency of the regulations weakens and violates the social security system that as a society has been consolidated in the Constitution of the Republic of Ecuador; and, therefore, undermines the good governance of the IESS.

3 Judgment No. 019-16-SIN-CC of the Constitutional Court declared the deferred unconstitutionality of the second and third paragraphs of article 28 of the Social Security Law regarding the appointment of the representatives of the insured, employers and their alternates before the IESS Board of Directors.

4 Judgment No. 380-17-SEP-CC, of the Constitutional Court modulated the effects of the judgment and modified the second paragraph of article 102 of the Social Security Law, thereby guaranteeing health coverage for minor dependents up to eighteen years of age, declared by the competent authority in cases of family custody, foster care or appointment of a guardian.

This lack of articulation of the national regulations on social security is evidenced in aspects such as transparency which, even though it constitutes a criterion for managing the public social security system, article 1 of the Social Security Law does not include transparency among its guiding principles, which generates friction between the principles and management criteria that govern the concept of social security agreed upon as a society and those that are implemented in the social security program administered by the IESS (Calasí et. al., 2020, p. 8).

The Ecuadorian Institute of Social Security as an autonomous entity, responsible for providing the contingencies of compulsory universal insurance to its members, has an administrative structure whose highest governing and management body is the Board of Directors.

The IESS Board of Directors is the body responsible for issuing policies for the application of the Mandatory General Insurance. The mission of this body is related to: a) the issuance of the regulations for the organization and operation of general insurance administered by the IESS, b) the strategic planning of pension savings, c) the regulation and supervision of insurance directorates general and special applied by the IESS; and, d) the supervision of the acts of the IESS administration, as provided by the Social Security Law.

In general, the Social Security Law provides that the IESS must have the following administrative structure:

a) Governing and management bodies: They are governing bodies and senior management of the IESS, responsible for the application of the Compulsory General Insurance in the national territory (Social Security Law, 2001). The IESS has the following governing and management bodies:

a. Board of Directors.	b. General Management ⁵ .	c. The Provincial Directorate ⁶ .
------------------------	--------------------------------------	--

b) Specialized Directions: They are management bodies, specialized in the assurance of contingencies and qualification of the right to benefits granted by the Compulsory General Insurance, with the degrees of operational autonomy indicated by the Regulation. (Social Security Law, 2001). The IESS has the following specialized addresses:

a. The Directorate of the General Individual and Family Health Insurance;	b. The Directorate of the Pension System;
c. The Directorate of General Labor Risk Insurance; and,	d. The Rural Social Security Directorate.

c) Administrative claim bodies: They are administrative claim bodies and responsible for the approval or denial of claims for benefits raised by the insured, the following:

- | | |
|-------------------------------------|---|
| a. The National Appeals Commission. | b. The Provincial Commission of Benefits and Controversies. |
|-------------------------------------|---|

d) Auxiliary Body⁷: The IESS has an Actuarial Directorate that constitutes a technical advisory body of the IESS, hierarchically subordinate to the IESS Board of Directors.

⁵ The Director General is appointed by the IESS Board of Directors and is the legal, judicial and extrajudicial representative of the IESS.

⁶ The Provincial Directors are appointed by the Director General of the IESS.

⁷ The Technical Investment Commission was an auxiliary body of the IESS; however, in 2009, with the creation of the Bank of the Ecuadorian Institute of Social Security, this body was abolished.

e) Internal Control Body⁸: The IESS has an Internal Audit that depends hierarchically on the IESS Board of Directors.

Next, for the purposes of the topic addressed in this article, the composition, the attributions of the highest governing body of the Ecuadorian Social Security Institute (IESS) and other factors that concern the governance of this entity will be analyzed.

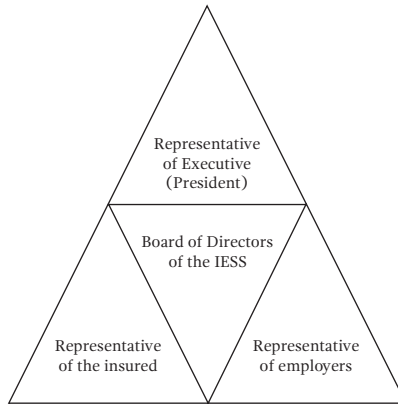
1.1. Formation of the Board of Directors of the Ecuadorian Institute of Social Security

Article 28 of the Social Security Law (2001) provides that the composition of the highest governing body of the IESS is tripartite⁹ and parity, as detailed in the following graph:

8 The International Labor Organization (Calasí et. Al., 2020, p. 10) points out that the IESS, as it does not have an internal mechanism to promote the oversight and impartial evaluation of its processes, is manifested as a concern of the actors, who They mention that the Ethics and Transparency Committee is new and there are no results yet (6 out of 20 specialists consulted). Additionally, half of the IESS officials (50.2%) are not aware of the existence of the Ethics and Transparency Committee. Added to the above is the perception that the Ethics and Transparency Committee does not allow an impartial evaluation of compliance with the actions of the Institution's collaborators; since more than half of the specialists consulted mention that corruption is directly related to political interference in the IESS.

Hence, several experts consulted by the ILO (2020, p.38) highlight the importance of real internal control mechanisms, such as through an internal audit that is endowed with real levels of independence, as well as generating another mechanism to avoid possible conflicts of interest between the Board of Directors of the IESS and the internal auditor, since the appointment of the latter is in charge of the highest governing body of the IESS, according to article 27, literal g, of the Social Security Law. In addition, it must be taken into account that the IESS has a really new Ethics and Transparency Committee, so there are no major elements to consider.

9 The tripartite structure of the IESS Board of Directors is supported by Convention 102 of the International Labor Organization that contains the minimum standard on social security. Said Convention establishes that the governing bodies of social security entities must have the authority as well as the representative of the insured and the employers.

Figure 1: Formation of the Board of Directors.

Source: Article 28 of the Social Security Law (2001)

Own Elaboration

The election process for each of the three members of the Board of Directors, in accordance with the Social Security Law (2001), is governed by the following precepts:

- a) The representative of the Executive Branch and his alternate shall be appointed by the President of the Republic for a period that will end at the end of the presidential term. However, said delegate will continue in office until the incoming President makes the new appointment. In accordance with resolution No. CD. 469, which contains the Substitute Internal Regulations for Operation and Sessions of the Board of Directors of the Ecuadorian Institute of Social Security, this representative has the casting vote in the event of a tie against the decisions that the highest governing body of the entity must take.
- b) The representative of the insured and their alternate will be appointed jointly by the legally recognized Trade Union Centers, the National Confederation of

Public Servants, the National Union of Educators, the National Confederation of Retirees, and the legally constituted organizations of the members of the Rural Social Security. Their term of office will be four years.

- c) The employer representative and his alternate will be appointed jointly by the National Federations of the following Chambers: of Industries, Commerce, Agriculture and Livestock, Construction, and Small Industry. Their term of office will be four years.

Likewise, to be a member of the Board of Directors it is required¹⁰: a) be in enjoyment of political rights; b) prove professional title; and, c) have exercised with notorious probity the profession or university teaching or some position of managerial responsibility in private or public activities, and prove experience in the performance of them for a period of not less than ten years, as provided in article 29 of the Social Security Law (2001).

In addition, the same rule provides that those who incur in the following circumstances cannot be members of the IESS Board of Directors: a) IESS officials or employees; b) Those sentenced for fraud against private or public entities; c) IESS defaulters due to employer or personal obligations; d) People who have their own interest or represent third parties in the ownership, management or management of the companies awarded the pension savings administrators, the insurance companies or other people that make up the national social security system; e) Those who as a result of a judicial resolution are disqualified from the performance of a public function; and, f) Those who are prevented by other legal provisions.

10 In Article 29 of the Social Security Law published in the Official Gazette Supplement No. 465, of November 30, 2001, it was established that, to be a member of the IESS Board of Directors, it was required to be over 40 years of age. Said requirement was declared Unconstitutional through a Constitutional Court ruling No. 11, published in the Official Gazette Supplement No. 504, dated May 20, 2015.

In addition, in response to the guarantee of good governance of the IESS, as a principle of organization of the entity, the Superintendency of Banks must verify compliance with the requirements prior to the appointment, as well as the declaration of impediment to the exercise of the position when incur in any of the prohibitions or inabilities previously described and detailed.

For the performance of functions, the members of the Board of Directors shall exercise the powers conferred on them by the Social Security Law, full time and may not provide other remunerated services or perform other positions, except the university chair¹¹.

Additionally, article 101 of the Social Security Law provides that, in the performance of their duties, all IESS officials, including the members of the Board of Directors, will have direct responsibility for actions and omissions, therefore, in the event of any non-observance, breach or transgression of the regulations, will be removed from their representation or position, as indicated below:

The directors, officers, servants and workers of all dependencies of the IESS, which are directly responsible for actions or omissions, carried out in the fulfillment of their functions, and that are not covered by the Law or regulations, will be removed from their representation or position and will have civil liability for damages that they may have caused, regardless of the criminal liability that may arise. The resolutions of the Board of Directors and the administrative decisions of the executive bodies of the IESS, which contravene the provisions of this Law and its regulations, or which cause damages to the IESS, they will determine personal and pecuniary responsibility to those who have dictated

11 The members of the Board of Directors will receive the remuneration set in the Institute's Budget, with prior approval of the Minister of Economy and Finance (Social Security Law, 2001).

or to whom They have contributed to them with their vote, regardless of the criminal responsibility that may arise. (Social Security Law, 2001, art. 101)

For the appointment of the representatives of the insured, of the employers and of their alternates, as provided by the Social Security Law (in force since 2001), the President of the Republic must issue the respective Regulations.

In observance of said legal mandate, the Regulations were issued for the appointment of the representative of the insured, the representative of the employers, and their respective alternates before the IESS Board of Directors. However, Resolution No. 0024-2007-TC, of the Constitutional Court, published in the Official Registry Supplement No. 375, of July 7, 2008, declared the unconstitutionality of articles 1, 2 and 3 of the referred Regulation due because they did not guarantee equity in the participation of the actors involved in social security.

Consequently, the constitutional body ordered the Constitutional President of the Republic to issue the pertinent regulations for the appointment of the representative of the insured before the Board of Directors of the Ecuadorian Institute of Social Security based on criteria that guarantee equity in participation. of the different organizations that make up the respective electoral college.

Years later, the Econ. Rafael Correa Delgado, constitutional president of the Republic of Ecuador, by Executive Decree No. 1257, of August 3, 2012, published in the Official Gazette Supplement No. 765, of August 13, 2012, issued the replacement Regulation for the designation the representative of the insured and the representative of the employers, and their respective alternates before the Board of Directors of the Ecuadorian Institute of Social Security.

This Regulation granted the National Electoral Council a period of 45 days from the publication of the Decree in the Official Registry to summon: a) the legally recognized Trade Union Centrals, the National Confederation of Public Servants, the National Union of Educators, to the National Confederation of Retirees, and, to the legally constituted third degree national organizations of the affiliates of the Rural Social Security; and, b) the National Federations of: Chambers of Industry, Commerce, Agriculture and Livestock, Construction and Small Industry.

In both cases, said call was intended to integrate the respective Electoral Colleges for the appointment of the main and alternate representatives of the insured and employers before the Board of Directors of the Ecuadorian Institute of Social Security. This appointment had to be carried out through democratic, participatory and transparent processes that ensured the representation of all those involved.

The electoral colleges were integrated as follows:

Insured	Employers
a) A representative of the legally recognized national trade union centers.	a) A representative of the National Federation of Chambers of Industries.
b) A representative of the Confederation of Public Servants.	b) A representative of the National Federation of Chambers of Commerce.
c) A representative of the National Union of Educators.	c) A representative of the National Federation of the Chambers of Agriculture and Livestock.
d) A representative of the National Confederation of Retirees.	d) A representative of the National Federation of Construction Chambers.
e) A representative of the legally recognized national organization of the Campesino Social Security affiliates.	e) A representative of the National Federation of Chambers of Small Industry.

Figure 2: Actors involved in the appointment of the members of the Board of Directors.

Source: Executive Decree No. 1257 (2012)

Own elaboration

Finally, once the procedure provided for in the Substitute Regulation issued by the President of the Republic of Ecuador had concluded, in November 2012, the insured named Paulina Guerrero as their main representative and Luis Clavijo as alternate, while the employers appointed Felipe Pezo

as its main representative and César Rodríguez as its alternate. Said representatives were appointed to fulfill their functions as members of the IESS Board of Directors for a period of four years, in accordance with the Social Security Law.

However, on November 12, 2015, the Superintendency of Banks removed Paulina Guerrero from her position as a member representing the insured. And in the face of this definitive absence, according to the provisions of article 28, first paragraph of the Social Security Law and article 2 of the Regulation for the Integration of the Board of Directors of the Ecuadorian Institute of Social Security, Mr. Luis Clavijo, as alternate representative of the insured subrogated the holder until the end of their term of office.

1.2. Competence and powers of the Board of Directors of the Ecuadorian Institute of Social Security.

Article 27 of the Social Security Law (2001) confers on the IESS Board of Directors a series of attributions, including the following: a. The approval of the policies and programs for the application of the Mandatory General Insurance; b. The administrative regulation for the provision of the Mandatory General Insurance; c. The issuance of technical standards and resolutions of mandatory compliance by the others IESS authorities; F. The issuance of the internal regulations of the IESS; g. The appointment of the Director General, Deputy Director General, of the members of the Commission National Appeals, the Actuarial Director, the Internal Auditor, the Director of the Administrator of the General Individual and Family Health Insurance, of the Director of the Administrator of the Pensions, the Director of the Rural Social Security, and the Director of the General Risk Insurance from work.

In accordance with this provision, the actions of the Board of Directors are not only limited to the approval of policies, technical standards, resolutions, actuarial balances, financial statements, budgets and authorization to celebrate

acts and contracts that exceed the maximum amount authorized to the General Director of the IESS, as it also corresponds to “ assume strictly administrative powers and participate in management processes, including the appointment of officials ”(Borja, 2018, pp. 157-158).

Hence, Durán (2008) affirms that the “powers of the Board of Directors are rather administrative, instead of focusing on the direction of institutional policy itself” (pp. 26-27). This is due to the fact that “it is completely unusual in social security institutions, since it is normally understood that the role of a Board of Directors consists of directing policies (leadership) and regulations” (ILO, 2008, p. 26).

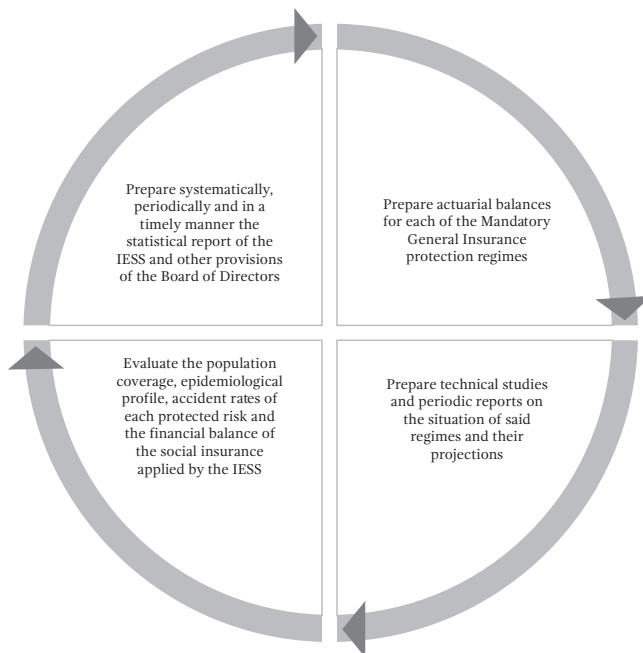
In this regard, the Good Governance Guidelines of the International Social Security Association (ISSA) constitute “a guide for a responsible, transparent, predictable, participatory and dynamic administration of social security institutions” (ILO, 2020, p. 6), because they establish that:

The mandate of a social security program usually distinguishes between ‘board of directors’ and ‘management’; the first is the institutional governing body in charge of formulating policies, and the second is in charge of managing the program and applying the resolutions of the board of directors. (ISSA, 2020, n. p.)

The Ecuadorian Institute of Social Security and its governance do not conform to the guidelines of the International Social Security Association, because in the Ecuadorian social security entity a model prevails that breaks into the administration, since the IESS Directive Council also intervenes in management, despite the fact that this attribution should be in charge of the General Directorate and other hierarchically lower positions.

But, the International Labor Organization points out that this problem is not current, since “historically these two functions (government and management / administration) have been intermixed in the IESS, which has generated a model of tripartite political representation that “invades” the administration” (ILO, 2008, p. 163)., And, at the same time, it suggests, if not expressly, at least tacitly a review at the normative level of this matter in order to guarantee adequate management and good governance of the Ecuadorian Institute of Social Security.

Additionally, as previously analyzed, the Social Security Law has provided that the IESS will have an advisory body subordinate to the Board of Directors. This body corresponds to the Actuarial, Research and Statistics Directorate. This Directorate is in charge of the Actuarial Director, whose appointment falls on the Board of Directors and his functions have a period of four years. The powers of the Actuarial Directorate are detailed in the graph below:

Figure 3: Attributions of the Actuarial Directorate of the IESS.

Source: Article 45 of the Social Security Law (2001).

Own elaboration

The existence of this auxiliary body is intended to provide technical support and support to the IESS and its Board of Directors to guarantee that the adoption of the different decisions leads to the appropriate organization and operation of general insurance administered by the IESS, strategic planning of pension savings, regulation and supervision of the general and special insurance directorates applied by the IESS.

However, this body requires the implementation of the mechanisms for technical actuarial strengthening and independence in the issuance of results and recommendations; and subsequent application (Actuarial Valuation IESS, 2019,

p. 242), for avoid the influence that may exist of third parties on the results of actuarial studies (Actuarial Valuation IESS, 2019, p. 242).

Thus, as a guarantee mechanism for the good governance of social security entities, The Guidelines of the International Social Security Association (2019) emphasize that “actuarial work must be framed within technical actuarial parameters, using internationally accepted methodologies for the actuarial issue; as well as guaranteeing the sufficient independence of the professionals who carry out the studies to issue their results, conclusions and recommendations” (n. p.).

In this regard, the International Labor Organization agrees by suggesting the strengthening of the “Actuarial Research and Statistics Directorate of the IESS to expand and improve its capabilities in actuarial matters. Similarly, it is recommended to improve the quality of the information used in actuarial studies.” (ILO SEGURO IVM, 2020, p. 53).

In this case, the Actuarial, Research and Statistics Directorate of the IESS presents some difficulties marked by some factors such as: a) the quality of the base information for actuarial studies due to factors such as the preservation of documentation; b) the weak management of archives, c) the deficiency of the systems and the need to implement technological systems¹²efficient; d) the lack of implementation of internationally accepted methodologies, which has even generated contradictions between actuarial studies; e) the influence that may exist from third parties on the results of actuarial studies; and, f) the lack of necessary levels of

12 The International Social Security Association points out that one of the ten global challenges of social security is the technological transition (The technological transition) because communication and information technology plays a strategic role in the implementation of social security programs, since it allows improvements in the performance and quality of the service of the social security administration. (ISSA, 2019, p. 19). ICTs allow not only the automation of specific processes, but also the transformation of operations and services. (ISSA, 2019, p. 19). ICTs constitute “a strategic enabler of innovative solutions to respond to social transformations and challenges.” (ISSA, 2019, p. 19).

independence of the body in charge of appointing its Director, in issuing its results and recommendations.

This constitutes a major problem that deserves solutions in the short term, because the adequate management of this technical body constitutes the support of the decisions that must be adopted to guarantee the sustainability of the system and the right to social security of the insured, and these cannot be subject to purposes other than those provided for in current regulations.

1.3. Unconstitutionality of the second and third paragraphs of article 28 of the Social Security Law

On October 20, 2015, Mrs. Silvia Carolina Vásquez Villareal presented a public action of unconstitutionality before the Constitutional Court, against the third paragraph of article 28 of the Social Security Law, published in the Official Registry Supplement No. 465, of 30 of November 2001, considering that said provision violated one of the principles that govern the exercise of rights, in this case the principle that all people are equal and will enjoy the same rights.

The third subparagraph of article 28 of the Social Security Law (2001) object of the unconstitutional public action provides the form of designation of the employers 'representative, in the following terms: "The employers' representative and his alternate shall be appointed jointly by the National Federations of Chambers: of Industries, Commerce, Agriculture and Livestock, Construction, and Small Industry".

The plaintiff based its claim on various constitutional provisions, such as the right to formal and material equality and non-discrimination, especially on the guiding principles of the social security system, as provided in article 367 of the Constitution of the Republic of Ecuador, in the sense that in the IESS Board of Directors:

All employers must be (sic) as representatives, this in compliance with the principle of universality, inclusion and integration, enshrined in the Constitution, thus responding effectively to the right to representation in the social security system, as all natural or legal person, public or private, etc., by the simple fact of becoming an employer in Ecuador, covering more than just the chambers of commerce, agriculture and livestock, construction and small industry, who would be the only representatives to the system of Ecuadorian social security (Sentence No. 019-16-SIN-CC, 2016, pp. 4-5).

Similarly, the plaintiff based its claim on the fact that not all employers are represented on the Board of Directors and cited some examples, including domestic employers and those who belong to the system of the popular and solidarity economy, employers of self-employment, employers of various federations and associations in the country, and other employers. The plaintiff pointed out that even though the Social Security System¹³ It is universal and inclusive and even more, since employers are an active part and economic contributors of it, it is considered only the National Federations of Chambers whose main objective, at their discretion, is to work according to the particular interests of its partners, hence it concludes by stating that the provision is unconstitutional.

During the analysis of the norm whose unconstitutionality was demanded and in general of all article 28 of the Social Security Law, the Constitutional Court highlights the disarticulation between the Social Security Law and the Constitution of the Republic of Ecuador. The Court notes that said “normative acts with general effects contain preconstitutional normative provisions dating from the year 2001, the same ones that, as analyzed *ut supra*, do not conform to the current constitutional framework and the model of

13 Article 367 of the Constitution of the Republic of Ecuador (2008) provides that the social security system is universal and public. Said system is guided by the principles of the national system of inclusion and social equity and by those of obligation, sufficiency, integration, solidarity, participation and subsidiarity.

the constitutional State of rights and justice.” (Judgment No. 019-16-SIN-CC, 2016, p. 25).

Furthermore, in this analysis, the Court reaches the conclusion that not only the third paragraph (designation of the representative of the insured respectively) generates a burdensome situation to the current constitutional framework, since that also occurs with the second paragraph (designation of the representative of employers).

Said incongruity between the Law and the constitutional precepts lies in the lack of recognition of the regulations for the different forms of work, the rights of participation that include access to public sector institutions, as well as the principles of equality, non-discrimination and equity within the social security system (Sentence No. 019-16-SIN-CC, 2016, p. 25).

And, since these are current legal provisions, which are having legal effects for “their recipients -users of the social security system-, the Court emphasizes that it is not pertinent *prima facie* to expel the normative provisions in a radical way” (Judgment No. 019 -16-SIN-CC, 2016, p. 26)., In order to avoid a regulatory vacuum that causes a greater violation of the rights to equality and participation; and, in this way, guarantee the integrity of the Constitution of the Republic.

In accordance with article 130 of the Organic Law of Jurisdictional Guarantees and Constitutional Control (2009) “when the declaration of unconstitutionality of a legal provision produces a normative omission that is a potential source of violation of constitutional rights or causes serious damage, it may be postpone the effects of the declaration of unconstitutionality. ”. In this sense, from article 96 of the Organic Law of Jurisdictional Guarantees and Constitutional Control (2009), it follows that a declaration of unconstitutionality with deferred effect is intended to “preserve the normative force and hierarchical superiority of the constitutional norms, and the full validity of constitutional rights. ”.

Hence, the Constitutional Court has resorted to an atypical ruling to modulate the effect of the declaration of unconstitutionality of the normative acts with general effects to guarantee the harmony and supremacy of the Constitution of the Republic of Ecuador (2008) and the unrestricted respect of the rights recognized in the Constitution and International Human Rights Instruments (Sentence No. 019-16-SIN-CC, 2016, p. 26).

Therefore, the Constitutional Court resolved what is detailed below:

Figure 4: Provisions of the Constitutional Court in Sentence No. 019-16-SIN-CC.

1	- Accept the claim of unconstitutionality of normative acts with general effects
2	- Declare the deferred unconstitutionality of the second and third paragraphs of article 28 of the Social Security Law, until the National Assembly, in exercise of its powers, dictate the norm that attends to the constitutional rights of equality and participation.
3	- Provide that the National Assembly urgently issue normative acts with relevant general effects to regulate the integration of the IESS Board of Directors, guaranteed participation and inclusion of all policyholders and employers.
4	- The National Assembly shall periodically report on compliance with this sentence to the Constitutional Court of Ecuador

Source: Sentence No. 019-16-SIN-CC (2016).

Own elaboration

For the deferred declaration of unconstitutionality of the subsections in question, the Constitutional Court has considered that, based on the abstract nature of the unconstitutionality action, the National Assembly “must immediately issue the regulations that are adapted to the constitutional rights in force, guaranteeing the rights of

participation and including representatives of all insured persons and employers within the IESS Board of Directors” (Sentence No. 019-16-SIN-CC, 2016, p. 25).

However, it is striking that despite the fact that the Court has emphasized that the sentences of deferred unconstitutionality are based on the “need to guarantee the integrity of the Constitution of the Republic” (Sentence No. 019-16-SIN-CC, 2016 , p. 27), in those situations in which “it is not possible *prima facie* to immediately expel an infra-constitutional normative provision from the legal system, for which a reasonable time must be established for the legislator to correct said unconstitutionality.” (Emphasis out of the text) (Sentence No. 019-16-SIN-CC, 2016, p. 27), has not established the referred reasonable time and has limited itself to providing an urgent reform of said normative acts by the Assembly National.

Even so, the Constitutional Court, as part of the deferred effect of the declaration of unconstitutionality, has determined in a ruling that until the National Assembly carries out the corresponding reform, all acts and decisions issued by the aforementioned Board of Directors will be valid and in force, as long as are subject to the legal norms and provisions that regulate them (Sentence No. 019-16-SIN-CC, 2016, p. 28).

From this it follows that until the body that presides over the Legislative Branch does not issue the amendment to the second and third paragraphs of article 28 of the Social Security Law -norms referring to the appointment of the representative of the employers and the insured, said Norms continue to be applicable, because the effect of their unconstitutionality has been postponed, with the purpose set forth in articles 96 and 130 of the Organic Law of Jurisdictional Guarantees and Constitutional Control (2009), that is, until there is a new norm according to the Constitution of the Republic of Ecuador.

Since the decision of the Constitutional Court, more than four years have elapsed without, to date, the National Assembly having complied with the disposition of the Court, that is, reforming the aforementioned rules of article 28 of the Security Law Social (2001) whose purpose, according to the judgment, is none other than to guarantee respect for the principle of equality and non-discrimination and the right to participation.

This delay of the National Assembly has caused that both the employers and the insured have not been able to count on their respective representative in the terms and conditions provided in Sentence No. 019-16-SIN-CC, issued on March 22, 2016, by the Constitutional Court; and, as will be detailed later, the IESS Board of Directors has also not been able to have a representative of the employers and a representative of the insured designated in accordance with the paragraphs whose unconstitutionality was deferred until the respective legal reform.

1.4. Dismissal of the representative of the insured before the IESS Board of Directors.

The Office of the Comptroller General of the State (2017) carried out a special examination of the process for determining the amount “of the debt for the State contribution for health benefits made to the Ecuadorian Institute of Social Security, IESS, for the period between 1 December February 2013 and December 31, 2016” (n. p.), contained in Report No. DAAC-0059-2017.

As a consequence of this special examination, the Office of the Comptroller General of the State, by means of Official Letter No. 1187-DNPR, of October 11, 2017, by predetermining the culpable administrative responsibility against Mr. Luis Antonio Clavijo Romero, member representing the insured before the Council Director of the IESS, imposed as a sanction his dismissal and a fine of seven thousand three hundred and

twenty US dollars (Judgment Process No. 17811-2018-01064, 2018).

Said act was notified in person to the aforementioned member, on October 31, 2017, due to the fact that in the exercise of his functions and in his period of performance comprised between March 24, 2015 and December 31, 2016, in his capacity as a member representing the insured before the Board of Directors of the Ecuadorian Social Security Institute, “despite knowing the conclusion reached by the Delegates of the IESS and the Ministry of Finance, in the Inter-institutional report 001 of April 13, 2015, on the non-existence of the State debt for medical benefits “(Judgment Process No. 17811-2018-01064, 2018, n. p.), the member in question, did not issue any pronouncement” on the legality and applicability of this conclusion in precautionary interest institutional, causing that, of the Verification Balance of the Health Fund, the right to collect from the State is eliminated, for the value of USD 2,527’819,221.81 ”(Judgment Process No. 17811-2018-01064, 2018, n. p.).

According to the Comptroller’s Office (Sentence Process No. 17811-2018-01064), this omission constituted a breach of the provisions contained in articles 7, 10, 50, 51 and 96 of the Social Security Law, published in the Official Registry Supplement No. 465, dated November 30, 2001, and non-observance of the following provisions:

[...] Article 4, numeral 1, literal h) of the IESS Organic Functional Regulations, issued with Resolution CD 457, published in the Supplement to Official Registry No. 45 of August 30, 2013”; as well as a violation of “Internal Control Standards Nos. 100-03” responsible for internal control “and 400” control activities “, for which it incurred the causes established in paragraphs 3, 6, 7 and 14 of article 45 of the Law¹⁴Organic of the

14 The Comptroller General of the State determined that, according to article 45 of the Organic Law of the Comptroller General of the State (2002), the

Comptroller General of the State. (Process Judgment No. 17811-2018-01064, 2018, sp)

Likewise, the Office of the Comptroller General of the State indicated that the representative of the insured, “despite knowing the conclusion reached by the Delegates of the IESS and the Ministry of Finance, in the Inter-Institutional Report 001, of April 13, 2015, on the non-existence of the State debt for medical benefits “(Process Judgment No. 17811-2018-01064, 2018, n. p.), it did not rule on the legality and applicability of this conclusion in caution of institutional interests, which caused that, “from the Health Fund Verification Balance, the right to collection from the State is eliminated, for the value of USD 2,527’819,221 , 81. “. (Sentence Process No. 17811-2018-01064, 2018, n. p.).

This dismissal sanction led the former representative of the insured to challenge the administrative act in court before the Administrative Litigation Tribunal based in the Quito canton, Pichincha province. Said Court, after the respective procedure, in a ruling issued on April 11, 2019, at 10:17 a.m., resolved accept the demand raised by Dr. Luis Antonio Clavijo Romero and, at the same time, decided to “declare the nullity of Resolution No. 36096 of November 23, **2017, notified on April 18, 2018** confirming faulty administrative responsibility 1187-DNPR of October 11, 2017 corresponding penalty for dismissal and a fine of USD 7,320.00” (Sentence Process No. 17811-2018-01064, 2018, n. p.) (Emphasis out of text).

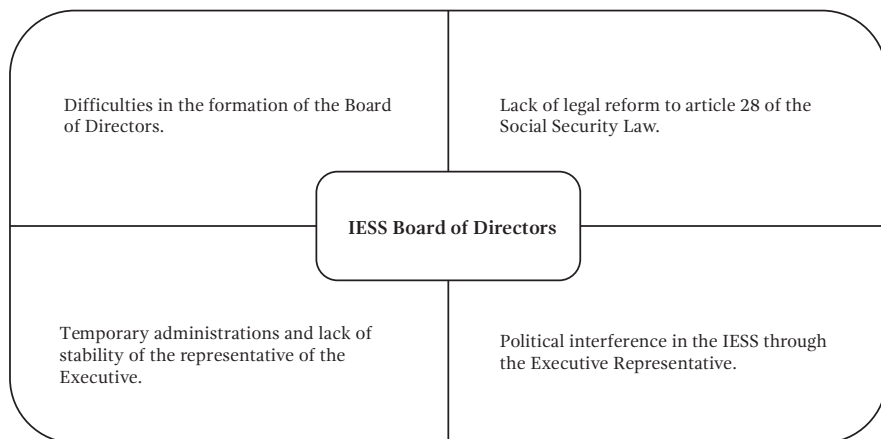
member representing the insured has incurred in negligent administrative responsibility, because its omission is included in the following causes: 3. Allow the violation of the law, of specific norms issued by State institutions, or of generally mandatory norms issued by the competent authority, including those related to the performance of each position; 6. Failure to establish or not apply, subject to this Law and other pertinent regulations, the subsystems of internal control and external control; 7. Not establishing or not applying, subject to the law and more pertinent regulations, the planning systems, administration of goods and services, public investments,

This judgment has already been executed and executed, after the appeal filed by the Comptroller's Office was inadmissible. This generated that, in November 2020, Mr. Luis Clavijo rejoined his functions as a representative of the insured; and, therefore, the IESS Board of Directors has resumed its tripartite composition with a representative of the insured and a representative of the employers in extended functions in both cases.

1.5. A Board of Directors with two members for more than two years, the lack of a legal reform for its formation and a governance conflict in the IESS

Currently, the Board of Directors of the Ecuadorian Social Security Institute faces several problems as detailed in the following graph:

Figure 5: Governance problems at the IESS.



Source: ILO (2020, n. p.)

Own elaboration

From this graph, each of the factors that trigger a governance conflict within the Ecuadorian Social Security Institute will be analyzed in detail, as follows:

1.5.1. The reinstatement of the Representative of the Insured and representatives in extended functions and the lack of consideration of the deferred effect of the Constitutional Court ruling:

As a result of the removal of the member representing the Insured by decision of the General Comptroller of the State, the Board of Directors of the IESS was made up of only two members, one of them, the member representing the employers¹⁵ in extended functions, because he has not been legally replaced: and, by the delegate of the Executive.

Although, article 13 of Resolution No. CD. 469, of the Internal Substitutive Regulation of Operation and Sessions of the Board of Directors of the Ecuadorian Social Security Institute, provides that the highest governing body of the entity will work with at least two of its members, it is no less true that since 2016, no the deferred effect of the unconstitutionality of the second and third paragraphs of article 28 of the Social Security Law has been considered.

This means that a new appointment of the members representing the insured and the employers with their respective alternates has not been proceeded in accordance with said regulations, which even when they have been declared unconstitutional, their effect has been deferred until the National Assembly issues the pertinent reform, which has not happened, because at present the report for the first debate of the draft Reform Law to the Social Security Law that addresses the treatment of article 28 of said normative body has barely been approved.

15 In May 2020, Eng. Felipe Pezo, the main representative of the employers before the IESS Board of Directors, submitted his resignation; and, therefore, the alternate member, Mr. César Rodríguez, has assumed such functions.

This unusual situation regarding the composition of the IESS Board of Directors was even questioned by several experts interviewed by the Office of the International Labor Organization for the Andean Countries, in a report containing the Results of a qualitative study: Interviews with social security specialists about the performance of the IESS, in which it is highlighted that this situation generates that there is no “Governance or administration in the entity” (ILO, 2020, p. 26).

In this case, more than four years have elapsed since the second and third paragraphs of article 28 of the Social Security Law (2001) were declared unconstitutional with deferred effect, and this has given rise to several omissions and non-compliance on the part of the competent bodies, because:

- a) A new election process for the two members of the Board of Directors has not been carried out, due to the inaction of the competent bodies (Executive and National Electoral Council);
- b) The National Assembly has not approved any reform in compliance with the ruling of the Constitutional Court.
- c) For more than two years, the Board of Directors did not have a representative of the insured and all decisions were adopted by only two representatives.
- d) By decision of the competent court, in November 2020, the representative of the insured has been reinstated to the IESS Board of Directors.
- e) Despite the fact that the IESS Board of Directors has once again had a tripartite structure, the representatives of the insured and the employers are in extended functions.

Therefore, all this series of inactions, omissions, non-compliance and non-compliance have violated the principle of social security participation and violate the good governance guidelines of social security entities.

1.5.2. Lack of legal reform to article 28 of the Social Security Law:

At present, the National Assembly continues to discuss the Draft Reform Law to the Social Security Law that contains the proposed amendment to article 28 of that normative body, regarding the formation and appointment of the IESS Board of Directors.

The report for the first debate of this bill was sent to the Presidency of the Assembly on December 5, 2018 and was approved in the first debate in the first months of 2019. As of that date, it is still under treatment by part of the Permanent Specialized Commission on Workers' Rights and Social Security.

In this bill, certain aspects related to the composition of the IESS Board of Directors are modified, in the sense that it establishes that the composition will be tripartite and equal between men and women. This means that gender criteria have been incorporated, despite the fact that the number of members remains at three, which would prevent compliance with gender parity (Canessa, 2019, p. 79).

In addition, a series of guidelines is incorporated for the members of the insured and the employers. Thus, in the case of those who are the incumbents, they must last two years in office, and once this period ends, they must be replaced by the alternate without the need for an administrative act.

Likewise, it is expressly provided that, in the case of employers, there will be a member who represents the chambers and one who jointly represents the popular and solidarity economy and non-union employers, either as principal or

alternate, but the reason for a formation of this nature is not justified in both the titular representative and his alternate.

The project eliminates any selection limited to the Federations of Business Chambers, because it only refers to legally constituted national employers' organizations but is vague in the concretization of the participation mechanism.¹⁶

In the case of the insured, it is mandatory to have a member of the active affiliates and one of the retirees, either as principal or alternate, but, equally, the reason for such a formation is not justified either in the titular representative as in his alternate.

The bill abolishes the criterion of trade union centers are general, since the current norm is limited to recognizing the participation of national trade union organizations. In addition, the criterion of "legally recognized" organizations is modified to "legally constituted" organizations.

For Canessa (2019), this brings with it a relevant legal distinction "between demanding that the national union organization be duly recognized by the labor authority, as expressed in the original regulation, and demanding that the national union organization comply with the legal requirements in its constitution." (p. 80).¹⁷

16 Canessa (2019) suggests that the voters on the employers' side could be all those mandates designated by the employers contributing to the IESS and who are up to date in the payment of the contributions, according to the data provided by the entity. While the presentation of the candidates could be in charge of the Federations of Chambers due to their status as the most representative organization and in the case of non-union employers, they could present their independent candidates with the support of a percentage of the employers' voters. (p. 81).

17 To avoid this disparity, Canessa (2019) suggests that the Ecuadorian legislator could take elements of the Uruguayan model in which all contributors registered with the Social Security Bank are voters, who are precisely those who make up the electoral roll and elect their representative. Thus, it is not considered whether or not they belong to a trade union center. In the Ecuadorian case, it indicates that it could be proposed that the legally constituted national workers' organization can directly present its candidates (owner and alternate) given its status as the most representative

Even those who are not members of the union are considered voters; However, this could generate an unjustified distinction because no requirements are required for these voters, while the other voters are required to be members of a legally constituted organization (Canessa, 2019, p. 80).

Finally, the presidency of the Board of Directors would continue to be the responsibility of the representative of the Executive, for whose appointment only the decision of the Executive is sufficient, without there being a selection process.

In addition, the regulation of the election process would no longer be the responsibility of the Executive but of the National Electoral Council, in accordance with the provisions of Article 219 of the Constitution of the Republic of Ecuador, since this entity is responsible for “organize, direct, monitor and guarantee, in a transparent manner, the electoral processes, convene elections, carry out the electoral counts, announce the results, and possess the election winners.” (CRE, 2008).

The Permanent Specialized Commission of Workers and Social Security continues with the preparation of the report for second debate; However, for the moment, it has not resolved the observations previously described, and, instead, has raised some additional elements that could generate more complex scenarios, due to factors such as:

- a) The darkness in the wording, since it would seem that the members of the Board of Directors could be empowered to exercise their profession by stating “they will carry out their professional duties without work dependency exclusively, full time” (Project text, 2020, p. 1). Unless the purpose of the legislator is that said members are not IESS officials, although the implications of a provision of this nature and the nature of the actions of the members of the Board of

organization. In contrast, non-union policyholders can present an independent list of candidates as long as they have the support of a significant percentage of voters defined by the project. Here,

Directors should be considered for purposes of control and responsibility. And, if they are considered as civil servants, they must limit themselves to exercising such function, such position for which they have been appointed, except for the university chair.

- b) An article 28.1. Would be incorporated, which could be the subject of analysis for a reform to 29 of the Social Security Law, in terms of requirements, inabilities and prohibitions.
- c) The representative of the Executive, who is also called the State Delegate, would be given a main function oriented to the defense and sustainability of the Ecuadorian social security system. This approach does not consider that the Board of Directors is a whole and in this lies its operation and actions. In addition, the social security system is comprised of public entities, rules, policies, resources, services and social security benefits and one of these entities is the IESS, therefore, with this provision, the scope of action of the State Delegate would be totally wide.
- d) The participation in the electoral colleges of organizations with legal status that are related to social security issues and organizations without legal status would be allowed, in the latter case provided that there is certification that, at least, 75% of its members It is not in unjustified delay with the IESS, BIESS and with the Internal Revenue Service. But, the underlying problem remains, because in the first case, the only requirement is related to being unionized, regardless of pending debts, and, in the second case, it is established that a certain percentage of its members should not have debts.¹⁸

18 This approach could generate greater difficulties and costs due to the imprecision in the wording and its implications. In this way, the most appropriate thing would be to take into consideration the Uruguayan model and consider as voters all active members and retirees, for the appointment

- e) Additionally, a bank of eligible persons would be created who could reach the Board of Directors in the event that the titled alternate member is absent permanently, which raises some questions, because these people would not be appointed by the voters and even their legitimacy could be questioned.

1.5.3. Political interference in the IESS through the representative of the Executive.

The Office of the International Labor Organization for the Andean Countries, in a report containing the Results of a qualitative study: Interviews with social security specialists on the performance of the IESS have indicated that the Presidency should not be exclusive to the government representative who should not have a casting vote, as provided in article 28 of Resolution No. CD. 469, which contains the Substitute Internal Regulations for Operation and Sessions of the Board of Directors of the Ecuadorian Institute of Social Security.

The experts consulted by the International Labor Organization (2020) highlight the following:

The importance of establishing mechanisms to limit its actions (in reference to the Executive delegate), to avoid interference by governments in the management of funds and reserves of the insured, and thus to safeguard the autonomy of the IESS, in the terms provided by the Constitution and the Social Security Law, such as establishing that the presidency of the Board of Directors does not fall on said representative, to avoid the permanence of this in the performance of this role, an aspect questioned by the experts; as well as to reform the norm that attributes to this delegate the casting vote in decision-making, and even to establish that the presidency of this body can be rotating. (p. 30)

of their representative. In the case of employers, they should proceed in the same way, with the only limitation that their participation should be conditional on compliance with their employer obligations with the IESS.

Some of these experts such as Fernando Mosquera point out that the IESS Board of Directors should not have a delegate from the Executive “because it is morally very questionable that the largest debtor of this Institution has an impact on decision-making, that is, a voice and casting vote in the management of the entity. (ILO, 2020, p. 30); However, one cannot fail to consider the provisions of Convention 102 of the International Labor Organization that guarantees the “Principle of participatory management of beneficiaries, employers and government authority in the management bodies.” (Canessa, 2019, p. 1).

In general terms, the experts agree that the presence without limitations of the Executive Representative before the Board of Directors has led to the entity not having an effective autonomy that conforms to the mandate of articles 370 and 372 of the Constitution of the Republic of Ecuador, due “the preponderance of government interests over the objectives of the Institution (ILO, 2020, p. 27).

Hence, through the Board of Directors “chaired by a delegate from the Executive Branch, various measures have been adopted whose financial support has been highly questioned and has had a significant impact in terms of sustainability in the long term.¹⁹”(ILO, 2020, p. 27).

The experts have highlighted the need to have suitable profiles on the Board of Directors and highlight the insufficiency of article 29 of the Social Security Law, on the minimum requirements, inabilities and prohibitions to form part of this governing body.

19 It is pertinent to note that on November 13, 2015, the IESS Board of Directors with the vote of the representative of the Executive and the representative of the insured approved Resolution No. CD. 501 through this decision, the contribution rates of three insurances administered by the IESS (Pensions, Health and Work Risks) were illegally redistributed, against sustainability as a criterion for managing social security with constitutional rank, since that the measure did not have financial support.

One of the experts interviewed states that “The members of the Board of Directors must comply with ethical and moral conditions such as not exercising politics (militancy), likewise, they must be people who are known, who have a level of expertise in related matters (in reference to social security) and In negotiation.”(ILO, 2020, p. 31).

However, the problem does not end in the establishment of requirements to be met by those who will make up the Board of Directors, since the difficulties also originate in the lack of an integrating axis of the social security system structured by the Constitution. This axis could be channeled through “an organism destined to the rectory of social security, of social protection.” (ILO, 2020, p. 31).

This entity should be in charge of establishing all social protection policies and the control of all entities that are part of the Ecuadorian social protection system based on the principles and criteria provided by the Constitution, for which it must be staffed with qualified personnel. for the good governance of the system and to guarantee the right to social security of the insured population.

1.5.4. Temporary administrations and lack of stability of the representative of the Executive:

During the last presidential term, the IESS Board of Directors has had four representatives of the Executive whose duration in office has been very short-lived, and even without any legal support, it has even had a delegate in charge, despite the fact that the Social Security Law does not foresee the figure of the commission. As of May 2020, by virtue of the resignation of its fourth delegate, in this case, Dr. Paúl Granda López²⁰, its fifth delegate was appointed.

20 The departure of Dr. Granda occurred in the midst of several scandals for alleged acts of corruption in various medical units of the IESS and for alleged purchases of medical supplies with surcharges and non-observance of the maximum amount authorized to the Director General of the IESS and his subsequent removal by the Board of Directors, through Resolution No. CD. 601.

This situation has caused a constant change of officials as each administration starts with a new team, in addition, this has had an impact in a certain way, the absence and subsequent return of the representative of the insured, together with the resignation of the representative of the employers.

The experts consulted by the International Labor Organization for the Andean Countries have indicated that “the high turnover of the President of the Board of Directors implies a lack of continuity in administrative management”(ILO, 2020, p. 32). This problem is evidenced in “the number of changes in management positions, starting with the CEO.”(ILO, 2020, p. 32).

Consequently, the great instability and ungovernability of the Ecuadorian Social Security Institute is even due to “the absence ... of a strategic plan that is used as a management instrument.” (ILO, 2020, p. 32).

In addition, the experts consulted, among them, Jorge Madera, have stated that “” if there is planning within the IESS it is an ornament, because the destabilizing model is still in force. “ (ILO, 2020, p. 32). In the same way, it has concluded by noting that the great destabilizer of the Ecuadorian Social Security Institute has been the Government due to the high turnover of its representative and due to the distortion of the mission and purposes of the entity, due to the preponderance of government decisions, which once again shows a lack of effective autonomy of the IESS.

This factor is closely related to the lack of suitable profiles in the Board of Directors of the IESS, management positions and in general, in a large part of the rest of the entity’s payroll, which has increased without any technical support even to the detriment of the entity, and even the confluence of stewardship and administration functions in the Board of Directors, the lack or deficiency of efficient technological systems, as analyzed in a report carried out by the Social Security Studies Board (2020, p.

13)., which highlights the importance of the IESS carrying out an analysis of its payroll in order to optimize resources through the use of technological tools and technical management of the entity based on the principles and management criteria provided by the Constitution of the Republic of Ecuador.

2. POSSIBLE SUGGESTIONS FOR THE FORMATION OF THE BOARD OF DIRECTORS OF THE IESS AND GOVERNANCE OF THE ENTITY

In this document some factors have been detailed that show the urgent need for a legal and administrative restructuring for the Ecuadorian Institute of Social Security in order to guarantee the good governance of the entity, the sustainability of its funds and the right to the insured population.

In such a way that this restructuring should start from a future reform regarding the formation of the Board of Directors, for which, it will be essential that the National Assembly safeguard and institute the necessary technical elements so that: a) the presence of a representative of the Executive does not constitute a violation of the autonomy of the Ecuadorian Social Security Institute, b) the insured and the employers can count on their respective representative after the processes that guarantee real compliance with the guiding principles of the social security system in Ecuador, for this An election system could be consolidated in which all active and retired members of the IESS participate, regardless of whether or not they belong to a trade union organization, and, all employers with the only limitation intended for those who are in default.

It could be established that the presidency is rotating, and, in any case, this reform should be linked to establishing a selection process for the representative of the Executive, in addition to providing this representative with real levels of stability and independence from the Executive. In addition, Resolution No. CD should be reformed. 469, so that the representative of the Executive does not have a casting vote.

The people who are going to make up the IESS Board of Directors should meet requirements related to knowledge and proven experience in social security and related matters, together with the existence of ethical and moral conditions and the prohibition that those who are going to make up this governing body are part of political organizations.

Therefore, the National Assembly should not only limit itself to the reform of article 28 of the Social Security Law, since it is also necessary to reform article 29 *ibidem* referring to requirements, inabilities and prohibitions.

Limitations could even be established for the representative of the Executive before the IESS Board of Directors, for which the scope and effects of Convention 102 of the International Labor Organization, which contains the minimum social security standard and other recommendations, must be taken into account. and inputs from the international organization to guarantee that the IESS Board of Directors is only an institutional governing body and does not have interference in the administration of the entity, to stop the irruption of interests outside the institutional ones, therefore the reform of the Article 27 of the Social Security Law regarding the powers of the Board of Directors.

In addition, it would be appropriate for the amendment to article 27 of the Social Security Law to attribute to the IESS Board of Directors only the functions of government (rectory), while the administrative functions provided for in said regulation should be performed by the Director General and, according to be the case, by other subordinate managerial positions, to guarantee a technical management of the entity based on current regulations.

In the same way, stability should be guaranteed to the General Director regardless of the continuity or not of the members of the Board of Directors, for this, their management period could be extended to five years or generate

some other mechanism that prevents that when starting a new administration, said official is replaced only by change of authorities and without legal support. In any case, its management must be subject to the strictest controls, evaluation and levels of transparency.

Furthermore, given that the Director General is subject to the same requirements, disabilities and prohibitions as the members of the Board of Directors, article 33 of the Social Security Law should be amended. The General Director must meet more rigorous requirements than the members of the Board of Directors, because this position is eminently technical, therefore it is necessary to establish more rigorous requirements due to the nature of the functions of this official.

Similarly, this restructuring must be accompanied by suitable and timely control by the control entities provided for by the Constitution of the Republic of Ecuador and the Social Security Law, or by the implementation of a governing body of security. Social; as well as the guarantee that the management of the entity will be governed by compliance with the principles and criteria of management of the Ecuadorian social security system, among which the transparency with which it must proceed in everything related to decisions of the Board of Directors, the Director General and other officials, to the use of efficient technological tools that guarantee this criterion and optimize resources, and, to the strengthening of the auxiliary technical body of the IESS (Actuarial, Research and Statistics Directorate).

Finally, while the National Assembly reforms article 28 of the Social Security Law, the appointment of representatives of the insured, the employers and their alternates respectively, could be carried out, taking into consideration that the second and third paragraphs of said article were declared unconstitutional with deferred effect; and, therefore, they continue to form part of the Ecuadorian legal system.

CONCLUSIONS

The governance of social security entities is materialized in the way in which the competent authority manages and achieves the entity's purposes, through the design, application and innovation of policies, standards, systems and organizational processes with the participation of the actors involved in the social security system.

The International Social Security Association has established a series of guidelines for the good governance of social security entities, among them, the importance that the Boards of Directors are only institutional governance bodies of these entities, therefore, the functions of administration must necessarily fall on the governing bodies. Likewise, the need to have an efficient regulatory framework constitutes another guideline for the good governance of these institutions.

The governance of the IESS is deficient because there is a disarticulation between the Social Security Law and the Constitution of the Republic of Ecuador. Another factor is given by the presence of a Board of Directors with functions of rectory and administration, which causes an invasion in the direction of the entity.

For some years, the IESS Board of Directors was not formed in a tripartite manner according to article 28 of the Social Security Law, due to the lack of a new process for electing the representative of the insured and the employers, which generated that both members remain in extended functions, and upon subsequent dismissal of the representative of the insured, by decision of the State Comptroller General.

Despite the fact that, in November 2020, by decision of the competent court, the representative of the insured has been reinstated to its functions and although the structure of the highest governing body has once again been tripartite, the violation of participation as a principal rector of social

security persists, due to the fact that the term of office of this representative and the employer representative should have concluded at the end of 2016. Furthermore, this situation also diminishes the legitimacy of their actions.

The second and third paragraphs of article 28 of the Social Security Law were declared unconstitutional by decision of the Constitutional Court; however, the effect of such declaration was deferred until the National Assembly issues the corresponding reform. And, as the National Assembly has not complied with this provision of the Constitutional Court, the paragraphs in question have not been immediately expelled from the Ecuadorian legal system, in accordance with the Organic Law of Jurisdictional Guarantees and Constitutional Control.

The lack of a new process for electing the representatives of the insured, the employers and their alternates, as provided for in the second and third paragraphs of article 28 of the Social Security Law constitutes a violation of the principle of participation, to the governance of the IESS, and, at the same time, an inaction of the competent bodies (Executive and National Electoral Council) and even a breach of their functions, because those provisions continue to be in force since the National Assembly has not yet reformed them.

The National Assembly has not complied with the provision of the Constitutional Court in the March 2016 ruling, that is, it has not amended the paragraphs of article 28 of the Social Security Law that were declared unconstitutional with deferred effect. The report for the first debate on the Reform Law of the Social Security Law has barely been approved, in relation to article 28 of said normative body and to date, the discussion of this bill has not advanced, despite the fact that they have excessively exceeded the times established in the Organic Law of the Legislative Function.

The draft Reform Law to the Social Security Law in which the conformation of the IESS Board of Directors is discussed (Article 28 of the Social Security Law) is not technically oriented and there is obscurity in the wording of the changes incorporated by the Assembly Committee while it continues the discussion of the report for second debate.

In the event that this project was to be approved with the changes that, up to now, the National Assembly Commission has introduced, the magnitude of the IESS problem could increase as indicated in previous lines.

The Ecuadorian Institute of Social Security is subject to a totally deficient regulatory framework given by the disagreement between the Social Security Law and the Constitution of the Republic of Ecuador, therefore, a legal and structural administrative reform is required to solve the problems that, at the level of governance, institutionalist, quality of benefits and services and other aspects that concern this entity.

Although it will very probably no longer occur during this presidential period very close to the end of a few months, it will undoubtedly be the subject of a structural reform to the Ecuadorian Social Security Institute, the modification of the composition of the IESS Board of Directors, together with the establishment of Rigorous guidelines and requirements for those who are going to integrate this highest governing body of the entity, among which stand out, knowledge requirements, verified experience and other aspects that prevent interference in the technical management of the IESS.

The Director General of the IESS, said official should meet remarkably rigorous requirements in attention to the technical functions that he must perform, in addition, he should be provided with levels of stability so that he is not replaced without legal support.

It is imperative that the Actuarial, Research and Statistics Department of the IESS be strengthened through the use of efficient technologies, as well as the implementation of measures that guarantee the technicality of its products (reports) and recommendations; and, therefore, the independence of its Director and of the work of this body against aspects outside the institution.

Finally, for prevent the IESS from continuing to be subject to interests unrelated to its mission and purposes set forth in the Constitution of the Republic of Ecuador and in the Social Security Law, in a new regulatory body it will be essential to separate the government function: rectory or issuance of policies, management function: operational and administrative (ILO, 2008, p. 164), for which it will be important to take into account the recommendations made by the International Labor Organization throughout the nineteen years of validity of the Social Security Law (2001).

REFERENCES

- Borja, P. (2018). The decapitalization of the IESS Pension Fund vs. the right of affiliates. Quito: Corporation for Studies and Publications.
- Calasí, P., Jaramillo, D., Vallejo, F. and Maldonado, R. (2020). What are the main critical nodes of the Equatorial Institute of Social Security? ILO Office for the Andean Countries - Ecuador. Retrieved from: https://www.ilo.org/wcmsp5/groups/public/---americas/---ro-lima/documents/publication/wcms_749915.pdf
- Canessa, M. (2019). Democratic participation in the management of social security. Results of a comparative study. Ecuador: ILO. ILO Office for the Andean Countries. Retrieved from: https://www.ilo.org/wcmsp5/groups/public/---americas/---ro-lima/documents/publication/wcms_731636.pdf

- Cichon, M., et al. (2006). Financing of social protection. Madrid: ILO & Ministry of Labor and Social Affairs Recovered from: https://www.ilo.org/wcmsp5/groups/public/--ed_protect/---soc_sec/documents/publication/wcms_221564.pdf
- Constitution of the Republic of Ecuador. [Const.]. (2008). Chapter Six. Work and production. Section one. Forms of organization of production and its management. Corporation for Studies and Publications.
- Constitutional Court of Ecuador. (2016). Judgment No. 019-16-SIN-CC. Retrieved from: <http://portal.corteconstitucional.gob.ec:8494/FichaRelatoria.aspx?numdocumento=019-16-SIN-CC>
- Constitutional President of the Republic of Ecuador. Executive Decree No. 1257. (2012). R. O. 765 of August 13, 2012.
- District Court of Administrative Litigation. (2018). Sentence Process No. 17811-2018-01064. Retrieved from: <http://consultas.funcionjudicial.gob.ec/informacionjudicial/public/informacion.jsf>
- Durán, F. (2008). Diagnosis of the social security system in Ecuador. Lima: ILO Subregional Office for the Andean Countries.
- Ecuadorian Institute of Social Security IESS. (2019). Actuarial Valuation of the Disability, Old Age and Death Insurance of the Mandatory General Insurance. Actuarial, Research and Statistics Directorate. Recovered from: https://www.iess.gob.ec/documents/10162/14444609/IESS_IVM_estudio_actuarial_011.pdf
- General Contralory of the State. (2017). Report No. DAAC-0059-2017. Retrieved May 8, 2020 from: <https://www.contraloria.gob.ec/Consultas/InformesAprobados>

International Labor Organization ILO Office for the Andean Countries. (2020) Actuarial valuation of the disability, old age and death regime of the Ecuadorian Social Security Institute - 2018. Recovered from: https://www.ilo.org/wcmsp5/groups/public/---americas/---ro-lima/documents/publication/wcms_742001.pdf

International Labor Organization ILO Office for the Andean Countries. (2020) *Results of a qualitative study: Interviews with social security specialists on the performance of the IESS*. Recovered from: https://www.ilo.org/wcmsp5/groups/public/---americas/---ro-lima/documents/publication/wcms_747313.pdf

Regulation for the Integration of the Board of Directors of the Ecuadorian Institute of Social Security. (2004). Retrieved from: http://portal1.uasb.edu.ec:2055/Webtools/LexisFinder/DocumentVisualizer/FullDocumentVisualizerPDF.aspx?id=LABORAL-REGLAMENTO_PARA_LA_INTEGRACION_DEL_CONSEJO_DIRECTIVO_DEL_IESS

Resolution No. 0024-2007-TC. (2008). RO 375 of July 7, 2008.

Resolution No. CD. 469. (2014) Substitute Internal Regulation of Operation and Sessions of the Board of Directors of the Ecuadorian Institute of Social Security. Recovered from: <https://www.iess.gob.ec/documents/10162/33703/CD+469>

Sandoval, P. (2015). Paulina Guerrero challenged her removal from the IESS Board of Directors. El Universo newspaper. Recovered from: <https://www.eluniverso.com/noticias/2015/11/13/nota/5237370/paulina-guerrero-impugno-su-destitucion-consejo-directado-iess>

Social Security Studies Table. (2020). Ecuadorian Institute of Social Security (IESS) Bank of the Ecuadorian Institute of Social Security (BIESS) Institutions on the brink of collapse. Retrieved from: <https://drive.google.com/file/d/17WKkMDC4wcpIIp63-vhYTizNHgHFeTbt/view>

Substitute regulation for the appointment of the representative of the insured and the representative of the employers, and their respective alternates before the Board of Directors of the Ecuadorian Social Security Institute. (2012). Retrieved from: http://portal1.uasb.edu.ec:2055/Webtools/LexisFinder/DocumentVisualizer/FullDocumentVisualizerPDF.aspx?id=LABORAL-REGLAMENTO_DE_ELECCION_AL_CONSEJO_DIRECTIVO_DEL_IESS

Received: 01/07/2020

Approved: 12 /04/2021

Patricia Elizabeth Borja: Independent legal researcher

Email: patricia_borja@hotmail.fr

City: Quito

Country: Ecuador

ORCID: <https://orcid.org/0000-0002-4941-1893>

